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NOTES

RAPE: THE PARADIGMATIC HATE CRIME

KATHRYN M. CARNEY[†]

INTRODUCTION

On Wednesday, October 7, 1998, twenty-two year old Matthew Shepard was found unconscious and tied to a fence in the Wyoming countryside, his body severely beaten and burned. Shepard, who was gay, had met two men at the Fireside Lounge, a Wyoming bar, earlier in the evening. Both men told Shepard they were also gay, and persuaded him to leave the bar with them. When Shepard entered a pick-up truck with the two men, he was "pistol-whipped . . . until his skull collapsed."¹ Five days later, Shepard died without waking from the resulting coma.²

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¹ Howard Fineman, *Echoes of a Murder in Wyoming*, NEWSWEEK, October 26, 1998, at 42.

² See E.N. Smith, *Gay Man Beaten in 'Cowboy' Wyo.*, ARIZ. REPUBLIC, Oct. 10, 1998, at A1 (depicting the Shepard murder); see also Fineman, *supra* note 1, at 42-43; Steve Lopez, *To be Young and Gay in Wyoming*, TIME, Oct. 26, 1998, at 38; Robert W. Black, *Beaten Gay College Student Dies*, HOUS. CHRON., Oct. 13, 1998, at A-1. One of the convicted killers of Matthew Shepard, Aaron James McKinney, who was facing a possible death sentence, is currently serving two consecutive life terms as a result of a deal approved by Shepard's parents. See *McKinney to Serve Two Life Terms*, UNITED PRESS INTERNATIONAL, Nov. 4, 1999. The other killer, Russell Henderson, entered a guilty plea earlier in the year to avoid the death penalty. See Julie Cart, *Killer of Gay Student is Spared Death Penalty*, L.A. TIMES, Dec. 31, 1990, at A1. The duo was charged with first-degree murder, kidnapping, and aggravated robbery—neither was prosecuted under a hate crime law. See *id.* Currently, Dennis Shepard and his wife Judy are advocating the passage of the Hate Crimes Prevention Act. See Jennie Arnold, *Trial, Triumphs, and Errors: President Clinton Talks About His Successes, Battles and Hopes*, THE ADVOCATE, Nov. 7, 2000, at 30

In June 1998, in Jasper, Texas, James Byrd, Jr., a forty-nine year-old African-American father of three, was brutally murdered. Three white men, passing by in a truck picked up Mr. Byrd, who was, ironically, walking down Martin Luther King, Jr. Boulevard. The three men severely beat Mr. Byrd with a wrench, chained him by his ankles to their truck, and dragged him for nearly three miles, leaving bloodstains in their wake. Law enforcement officials found dismembered parts of his body spread along the country road, and his mangled torso in an African-American cemetery.³

On December 6, 1989, Marc Lepine marched into an engineering class at the University of Montreal. After separating the class by gender and screaming, "I want the women," he opened fire with a semi-automatic rifle. He left the classroom, passed through the corridors and into the cafeteria, killing a total of fourteen women during his rampage. He reasoned, "[F]eminists [have] ruined my life."⁴

(opining that Shepard's parents are "obviously not left-wing activists, just mainstream, hardworking Americans").

³ See Sonja Garza, *Fear, Shame Grip Rural Town*, DAILY NEWS, June 10, 1998, at 5 (describing James Byrd's horrific murder and the fears of the community where this crime occurred); see also Susan Molinari, *Racial Murder in Jasper County, Texas, Painful For African-American and White Community Alike* (CBS television broadcast, June 13, 1998). The three defendants, Lawrence Brewer, Shawn Berry, and John King were all convicted of capital murder. The addition of the charge of kidnapping made the defendants eligible for the death penalty and enabled jurors to sentence the defendants to death. See generally Claudia Kolker, *Texas Jury Finds Third Man Guilty in Dragging Death; Courts: The Final Defendant is Convicted in a 1998 Crime That Shocked the Nation*, LOS ANGELES TIMES, Nov. 19, 1999, at A-20. The jury convicted all three of capital murder but spared Berry the death penalty and instead he was sentenced to life imprisonment with eligibility for parole in forty-years. See *id.*

But if horror at Byrd's murder was nearly universal, opinion on how to handle it wasn't. To some civil liberties groups . . . the crime showed Texas' need to beef up its hate crime law. Yet Texas' Legislature has failed to change the law, and hate crime law in general remains an issue of debate across the nation.

Id. For another chilling account of a racial hate crime, see David Todd Smith, *Enhanced Punishment Under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259, 259 n.2 (1994). Smith relays the story of June 7, 1991, when three intoxicated white supremacists patrolled the streets of Arlington, Texas, looking for an African-American because they felt like killing one in a drive-by shooting. See *id.* In their search they came across two white men and Donald Thomas, an African-American, sitting in the back of a flatbed truck. See *id.* As the three white supremacists passed the flatbed, they fired a single shot, at point blank range, from their shotgun; Thomas was immediately struck and killed. See *id.*

⁴ JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY

In August 1997, twenty-one year old Patrick Langbelle, went on a weeklong rampage and spray-painted swastikas and derogatory racial slogans on the outside walls of several buildings including Temple Jeremiah in Northfield, Illinois. He also used an indelible marker to write anti-Semitic slogans on park benches. Most troubling was his recruiting of seventeen juveniles into his neo-Nazi group, and his urging that they engage in similar acts of vandalism.⁵

These accounts illustrate what are considered to be prototypical hate crimes⁶—crimes committed against individuals

AND BLOODSHED 90–91 (1993). After killing the women, Lepine turned the gun on himself. *See id.* The police recovered a suicide note in Lepine's pocket explaining his killing spree. *See id.* Lepine had been declined admittance into the military and denied admission into the engineering program at the University, both of which he blamed on "feminists." *See id.*

⁵ *See* Brian Cox, *Neo-Nazis Tied to North Shore Hate Crimes*, CHI. TRIB., Aug. 30, 1997, at 5; *see also* Barnes: *Crimes Bill Sends Message Governor Signs New Legislation, Set to Take Effect in July, Against Acts Spawned by Prejudice*, AUGUSTA CHRON., Mar. 31, 2000, at B-2 (noting that the defacement of a Synagogue prompted Governor Roy Barnes of Georgia to sign a new hate crimes law). Langbelle was charged with two separate hate crimes violations as well as compelling membership into an organization and contributing to the delinquency of juveniles. *See id.*

For a compelling tale of religious motivated crime that pre-dated the recognition of hate crimes, *see* NATHAN C. BELTH, *A PROMISE TO KEEP: A NARRATIVE OF THE AMERICAN ENCOUNTER WITH ANTI-SEMITISM* 59 (1979) (recounting the story of a young Jewish man named Leo Frank, who was charged with the rape and murder of a young child whose body was found in the factory he managed). The jury was threatened with death unless they brought in a verdict of guilty and the judge was similarly threatened if he did not pass a sentence of death. *See id.* Leo Frank was convicted by jury and sentenced to death. *See id.* Governor of Georgia, John M. Slayton, however, commuted Frank's sentence. *See id.* The enraged mob could not tolerate seeing the Jew alive, so twenty-five men took Frank from the jailhouse and hanged him from an oak tree. *See id.*

⁶ For other examples of prototypical hate crimes, *see* Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 566 n.7 (1998) (citing JUAN WILLIAMS, *EYES ON THE PRIZE* 39–57 (1987)) (describing the 1954 murder of 14-year old Emmet Till, an African-American boy from Chicago who was kidnapped and shot in Mississippi after allegedly saying, "Bye-baby" to a white woman in a grocery store); National Asian Pacific Am. Legal Consortium, 1994 AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS 6 (1995) (telling how Vincent Chin, a Chinese American, was murdered in the 1984 after being mistaken for a "Jap"; Americans at this time blamed Japan for the decline of the American auto industry); *see also* LEVIN & MCDEVITT, *supra* note 4, at 1–5 (describing the murder of Alan Berg, a Jewish radio personality in Denver by several members of a Neo-Nazi group); Steven Bennett Weisburd & Brian Levin, "On the Basis of Sex:" *Recognizing Gender-Based Hate Crimes*, 5 STAN. L. & POL'Y REV. 21, 23 (1994) (describing four crimes of extreme cruelty and depraved violence that would typically be considered hate crimes); David Van Biema, *When White Makes Right*, TIME, Aug. 9, 1993, at 40 (portraying the gruesome murder of Hattie Mae Cohens,

because of their race, religion, sexual orientation, gender, or ethnicity.⁷ In recent years, legislatures have turned their attention to hate crimes and have enacted legislation aimed at eradicating such victimization.⁸ Virtually every state has, to some extent, enacted legislation banning hate crimes.⁹ The rationale for such laws is that hate crimes exact a greater toll on their victims, as the victim is targeted on the basis of an immutable characteristic. The victim, therefore, is unable to prevent the attack, resulting in an increased sense of vulnerability¹⁰ not only for the victim, but also for other members of that community, or possessors of the same immutable trait.

Hate crime statutes vary in which types of bias-motivated crimes they penalize. Some states penalize only institutional vandalism committed with a bias motive.¹¹ Other states take a more inclusive view of hate crimes, and include, in addition to institutional vandalism, any bias-motivated violence based upon the victim's race or ethnicity.¹² Some states go further and consider crimes motivated by the victim's sexual orientation as crimes of hate.¹³ Although many states have included gender as

an African-American lesbian, and Brian Mock, a white disabled gay man by three white supremacist skinheads in 1992).

⁷ See Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, 157 (1994).

⁸ See Anti-Defamation League, *Hate Crimes Laws, Charts, and Graphs*, at www.adl.org/99hatecrime/provisions.html.

⁹ See *id.* (listing Wyoming as the only state without any form of hate crime legislation and describing all the statutes in existence across the nation).

¹⁰ See Kristin L. Taylor, *Treating Male Violence Against Women As A Bias Crime*, 76 B.U. L. REV. 575, 586 (1996) (noting that hate crimes exact a greater cost on their victims than do non-bias parallel crimes).

¹¹ See Anti-Defamation League, *supra* note 8. (noting that Hawaii, Indiana, Kansas, New Mexico, and South Carolina use this model).

¹² See *id.* (noting that Alabama, Alaska, Arizona, California, Colorado, Connecticut, Washington D.C., Delaware, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Mississippi, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wisconsin consider crimes based on the victim's race, religion or ethnicity as hate crimes).

¹³ See *id.* (noting that Arizona, California, Connecticut, Washington D.C., Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Tennessee, Vermont, Washington and Wisconsin are among the more progressive states). The most progressive states, Georgia, Utah, and Texas, all

a protected class in their hate crime statutes,¹⁴ prosecutions of gender-motivated crimes as hate crimes are rare.¹⁵ When gender-motivated crimes are prosecuted as hate crimes, they generally include claims of sexual harassment and battery, but rarely charges of rape.¹⁶

Yet rape is the paradigmatic hate crime. It is a crime that violates and defiles millions of women¹⁷ because of their gender, and still fails to be recognized as a hate crime. Like other hate crime victims, the rape victim is selected because she possesses an immutable characteristic—her gender.¹⁸ Like other hate crimes, rape inflicts grave psychological consequences upon the

specify that *any* form of bias-motivated violence will be prosecuted as a crime of hate. *See id.*

¹⁴ *See id.* (noting that Alaska, Arizona, California, Washington D.C., Illinois, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Vermont, Washington and West Virginia include gender as a protected class in their respective hate crime legislation).

¹⁵ *See* Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 129–30 (1999) (stating that there is a notable lack of reported cases involving gender bias). For incidents of gender-bias crimes being tried as hate crimes see *Beliveau v. Caras*, 873 F. Supp. 1393, 1401 (C.D. Cal. 1995) (denying a motion to dismiss a woman's claim of gender bias pursuant to the civil component of California's hate crime law after finding the defendant's conduct was sexual harassment); *O'Connell v. Chasdi*, 511 N.E.2d 349, 353–54 (Mass. 1987) (denying a motion to dismiss a woman's sexual harassment claim under the state's civil bias-crime law); *Massachusetts v. Aboulez*, No. 94-0985H, at 1–2 (Mass. Super. Ct. Mar. 14, 1994) (finding that the battering of a woman was a hate crime because of ample evidence of gender-motivation such as derogatory remarks and past history of girlfriend and spousal abuse).

¹⁶ *See supra* notes 14 & 15.

¹⁷ *See* DIANE CRAVEN, PH.D., BUREAU OF JUSTICE STATISTICS, SELECTED FINDINGS: FEMALE VICTIMS OF VIOLENT CRIME, NCJ-162602 (Dec. 1996) (finding that one out of every two hundred and seventy women are raped); *see also* Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L. J. 439, 448 (1993) (noting the results of Rape in America, a nationwide study directed at reporting the incidence of rape in America and finding that 12.1 million women are raped annually); Brande Stellings, Note, *The Public Harm of Private Violence; Rape, Sex, Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185, 197 (noting that a rape transpires once every five minutes nationally) (citing Staff of Comm. on the Judiciary, 102d Cong., 1st Sess., Report on Violence Against Women: The Increase of Rape in America iii (1990)); PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, July 2000, at <http://www.ncjrs.org/txtfiles1/nij/181867.txt> (taking into account significant underreporting, this survey notes that 4.7 million women are raped more than one time).

¹⁸ *See* TJADEN & THOENNES, *supra* note 17 (noting that the incidence of both rape and physical assault affect approximately 834,732 women annually).

victim and results in an increased sense of communal fear. This Note will argue that rape should be considered and prosecuted as a crime of hate. Rape is not an act of violence that simply happens to women—it is an act of hate that happens to women because they are women.¹⁹

Part I of this Note will define the characteristics of hate crimes in general and provide an overview of existing bias-crime laws and the purposes behind them. It will also detail the history surrounding hate crime legislation.²⁰ Part II of this Note will give a brief history of rape law reform. Part III of this Note will discuss the problem of rape in America, and argue that rape fits within the doctrinal framework of hate crime laws and, therefore, should be considered a crime of hate. Accordingly, states that have not yet included gender as a protected category within their hate crime statutes should do so, and states that have already included gender as a protected category should start prosecuting rape under those statutes. As a method of rape law reform, prosecuting rape as a hate crime will appropriately subject perpetrators to higher sentences. More significantly, reclassifying rape, as a crime of hate, will validate the victims' experiences, transform social norms, and specifically express society's anger and disgust.

I. HATE CRIMES

A hate crime generally refers to a crime committed because of hostility on the part of the accused toward the group to which the victim belongs.²¹ The recently enacted New York Hate

¹⁹ See Catharine A. MacKinnon, *Reflections On Sex Equality Under the Law*, 100 YALE L.J. 1281, 1301 (1991) (stating that "women are sexually assaulted because they are women . . . because of their membership in a group defined by gender").

²⁰ Throughout this paper the terms "hate crimes," "bias-crimes," and "gender-motivated crimes" will be used interchangeably.

²¹ See, e.g., Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 N.W. U. L. REV. 1015, 1016 (1997) ("Bias crimes . . . are crimes committed because of the race, color, or religion of the victim."); see also Maroney, *supra* note 6, at 564 ("Hate crime may be defined as acts of violence motivated by animus against persons and groups because of race, ethnicity, religion, national origin or immigration status, gender, sexual orientation, disability (including, for example, HIV status), and age."); Pendo, *supra* note 7, at 157 (stating that "violence aimed at people because of their race, religion, sexual orientation, gender, or ethnicity are crimes of hate-crimes that 'leave a stain on our Constitution'") (quoting 131 Cong. Rec. H5988, H5991 (daily ed. July 22, 1985) (statement of Rep. Mineta)); Weisburd & Levin, *supra* note 6, at 23 ("[T]he premise

Crimes statute defines a hate crime as an offense in which the perpetrator:

(a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or

(b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.²²

To fully comprehend the scope of the hate crime problem, it is necessary to examine the legislation enacted to combat it and to become familiar with the characteristics that define a hate crime.

A. Hate Crime Legislation

Because of the growing number of offenses²³ in which perpetrators had selected their victims based on each victim's membership in a particular category, the states and the federal government began to aggressively combat these "heinous and invidious"²⁴ criminal activities on both the state and federal level. The individual states started to wage their war against hate crimes in the mid-1980s, enacting enhancement legislation

underlying bias crime statutes is that . . . offenders select their victims based on the victim's membership in a particular status category.").

²² The New York Hate Crimes Act of 2000, N.Y. S.B. 4691, 223d Sess. (NY 2000).

²³ See Craig Peyton Gaumer, *Punishment For Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1, 5 (1994) ("The prevalence of hate crimes is undoubtedly rising."); see also James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 1-5, 13 (1997) (questioning whether there truly is a wave of hate crimes that are equivalent to an epidemic or whether there is simply a heightened awareness in recent years causing people to believe there is an epidemic; they conclude that the latter is the reality); Weisburd & Levin, *supra* note 6, at 27 (helping to understand and discuss the "epidemic of gender related crime as it presently exists").

²⁴ Weisburd & Levin, *supra* note 6, at 23 (noting that hate crimes are heinous and invidious because in effect they are crimes that subjugate entire groups to subordinate status).

to deter bias-motivated crimes.²⁵ These enhancement statutes typically provide additional punishment for a defendant who selected a victim based upon national origin, race, or religion.²⁶ A few states provide for additional punishment if the perpetrator selected his victim because of sexual orientation, disability, or gender.²⁷ The various state statutes differ not only by the categories they protect, but also in the remedies or penalties they implement.²⁸ The most popular approach is for states to provide for a criminal sanction and implement an enhanced penalty system modeled after the Anti-Defamation League hate crime legislation.²⁹ The enhanced penalty is intended to reflect the greater toll exacted on the community by the bias-crime.³⁰ This greater harm is evidenced by the impact felt by the victim and the secondary harm, which affects the larger community. One commentator noted, bias-crimes have become recognized as a way of "instill[ing] . . . fear and distrust in the target group in order to keep it in a role of subordination."³¹ This increased toll is also apparent because it diminishes one of the bases upon which our nation was founded: the guarantee of equality for all.³²

²⁵ See Anti-Defamation League, *Hate Crime Statutes: A 1991 Status Report* 2-5 (1991) (detailing the model hate crime legislation and noting that more than half of the state enacted legislation mirrors this model); see also Andrew M. Gilbert & Eric D. Marchand, Note, *Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999*, 30 ST. MARY'S L.J. 931, 932-37 (1999) (describing the history of hate crime legislation and the need for additional federal legislation); Maroney, *supra* note 6, at 567-68, 589-90 (1994) (describing the development of model statutes and hate crime jurisprudence).

²⁶ See Maroney, *supra* note 6, at 589-590 (defining enhancement statutes); see also Gilbert & Marchand, *supra* note 25, at 935.

²⁷ See *supra* notes 11-13 and accompanying text; see also Gilbert & Marchand, *supra* note 25, at 934; Anti-Defamation League, *supra* note 8 (illustrating which states have statutes that protect certain characteristics).

²⁸ See Anti-Defamation League, *supra* note 8 (noting that one state has only a civil action remedy for the victims of a hate crime, sixteen states impose a criminal penalty on the perpetrator of a hate crime, and twenty-seven states have both a civil remedy and a criminal penalty available).

²⁹ See *id.*

³⁰ See, e.g., Taylor, *supra* note 10, at 586 ("Because bias crimes exact a higher cost on the target group and society as a whole, society should punish these crimes accordingly."). Some scholars believe that the enhanced penalty is also justified by the enhanced culpability of the perpetrator. For a more thorough discussion of this philosophy, see Dillof, *supra* note 21, at 1019 ("[A]ll justifications for the increased penalties imposed by bias crime statutes can be analyzed as taking bias to be relevant to either the gravity of wrongdoing or degree of culpability.").

³¹ Taylor, *supra* note 10, at 585.

³² See *id.* at 586 (suggesting bias-crimes inhibit the attainment of equality).

The federal government, acknowledging the harm that hate crimes inflict,³³ has also begun to take steps to provide a remedy to the hate crime problem. First, the Hate Crimes Statistic Act of 1990³⁴ was enacted to help determine the actual extent of hate-related offenses, and to help facilitate the collection of such data.³⁵ The Act charged the Attorney General with the task of collecting data about crimes that manifested evidence of prejudice based on race, religion, sexual orientation, or ethnicity from local agencies.³⁶ In particular the Attorney General was to collect data on certain bias-motivated acts including murder, non-negligent manslaughter, rape, assault, arson, and vandalism.³⁷ The Act also established guidelines for the collection of such data, including the necessary evidence and criteria for a finding of manifest prejudice.³⁸ This act was designed to work in conjunction with The Omnibus Crime Control and Safe Streets Act,³⁹ a 1968 federal measure designed to protect individuals from violence based upon perceived race, religion, color, or origin.⁴⁰ The Hate Crimes Statistic Act was implemented to update section 245 and to provide new protection on the basis of gender, disability, and sexual orientation.⁴¹

In 1993, Congress enacted the Hate Crimes Sentencing Act.⁴² The Act directed the United States Sentencing Commission to promulgate or amend existing sentencing guidelines to provide three offense levels where the finder of fact

³³ See *White House Fact Sheet*, U.S. NEWSWIRE, June 19, 2000 (noting that in 1998, nearly 8,000 hate crimes were reported, almost one hate crime an hour). President Clinton was quoted as saying that "[t]his year America needs action. No one should be victimized because of how they look, how they worship, or who they are." *Id.*

³⁴ See Hate Crime Statistic Act, Pub. L. No. 101-275, 104 Stat. 140 (codified at 28 U.S.C. § 534 (1994)).

³⁵ See *id.*

³⁶ See *id.*; see also Maroney, *supra* note 6, at 594; Gilbert & Marchand, *supra* note 25, at 935.

³⁷ See *supra* note 35.

³⁸ See *id.*

³⁹ 18 U.S.C. § 245 (1994).

⁴⁰ See *id.*; see also Linda L. Ammong, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 5-6 n.10 (1994) (discussing how 28 U.S.C. § 534 amended 18 U.S.C. § 245).

⁴¹ For a full discussion of background and history, see Ammong, *supra* note 40.

⁴² Pub. L. No. 103-322, 108 Stat. 1796 (amended 9/21/93) (codified in part at 28 U.S.C. § 994 (1994)); see also Maroney, *supra* note 6, at 594-95 (discussing the Hate Crimes Sentencing Act); Gilbert & Marchand, *supra* note 25, at 937-38 (same).

at trial determines beyond a reasonable doubt that the crime constituted a hate crime. The amended sentencing guidelines went into effect in 1995.⁴³

In 1994 Congress enacted the Violence Against Women Act, (VAWA),⁴⁴ designed to supplement, rather than replace, existing state and federal remedies and to provide a federal remedy for the victims of gender-motivated violence.⁴⁵ The policy behind the VAWA was that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."⁴⁶ The VAWA created a private right of action to protect this civil right:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right to [be free from such violence] shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.⁴⁷

This section of the VAWA was, however, recently found to be unconstitutional. In *United States v. Morrison*⁴⁸, the United States Supreme Court found that in enacting this legislation, Congress had exceeded the scope of both its Commerce Clause authority as defined in the U.S. Constitution in Article I, section 8, and its authority pursuant to section five of the Fourteenth Amendment when it enacted this legislation.⁴⁹

⁴³ See UNITED STATES SENTENCING GUIDELINES MANUAL app. C, at 521 (1998).

⁴⁴ See Violence Against Women Act, Pub. L. No. 103-138 (codified at 42 U.S.C. § 13981) (1994)).

⁴⁵ See *id.*

⁴⁶ *Id.* In 1994 Congress passed the Civil Rights for Gender Motivated Violence Act (GMVA). See *id.*

⁴⁷ *Id.*

⁴⁸ 529 U.S. 598 (2000).

⁴⁹ For an in depth discussion of the unconstitutionality of 42 U.S.C. § 13981, see *United States v. Morrison*, 529 U.S. 598 (2000). This case involved the rape of a Virginia Polytechnic Institute (Virginia Tech) female in a freshman dormitory by two football players. The Supreme Court found that Congress had not exercised its powers pursuant to the Commerce Clause and accordingly held that the rape was not committed as a result of gender animus. See *Morrison*, 529 U.S. at 613-19.

Christie Brzonkala, a freshman at Virginia Tech, had been invited to a party in a room the floor below hers in the dormitory. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F.3d 779, 782 (W.D. Va. 1996), *rev'd*, *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F. Supp. 949 (4th Cir. 1997), *reh'g en banc*, 169 F.3d 820 (4th Cir. 1999), *cert. granted*, *Brzonkala v. Morrison*, 527 U.S. 1068 (1999).

Finally, the Hate Crimes Prevention Act of 1999 (HCPA),⁵⁰ which has failed to pass Congress, is designed to make federal prosecution of hate crimes more practicable. The 1968 Omnibus Crime Control and Safe Streets Act contained a jurisdictional hurdle that required: (1) the victim to be engaged in certain “federally-protected activities” at the time of the crime, and (2) that there be a connection between the crime and the activity.⁵¹ This jurisdictional requirement made it virtually impossible to bring federal prosecutions based upon discriminatory motives.⁵² The HCPA therefore sought to eradicate the “federally protected activity requirement” from Section 245.⁵³ The HCPA unfortunately failed,⁵⁴ and it remains difficult to bring a bias-

After spending a few minutes at the party she attempted to leave and the defendant, Morrison, pinned her down by her elbows with his hands, pressed his knees against her legs, and forced her to have sex with him. *See id.* Before Brzonkala could recover, a second football player came and exchanged places with Morrison, proceeded to rape Christie and when he was through he once again switched places with Morrison, who raped her for a third time. *See id.* Afterwards, Morrison told Christie that she “better not have any fucking diseases.” *Id.* Five months later Morrison was heard in the cafeteria bragging that he liked to “get girls drunk and fuck the shit out of them.” *Id.* The school took minimal action by suspending one of the athletes for a semester but shortly after reinstated the student and dropped the charges. *See id.*

⁵⁰ *See* Hate Crimes Prevention Act of 1998: Hearings on S. 1529 before the Senate Comm. on the Judiciary, 105th Cong. 6 (1998) (noting that the HCPA sought to eradicate the “federally-protected activity requirement” from section 245, which would facilitate federal prosecutions).

⁵¹ 18 U.S.C. § 245 (1968).

⁵² *See* Hate Crimes Prevention Act of 1998, *supra* note 50, at 5 (testimony of Eric H. Holder, Jr., Deputy Attorney General) (declaring the jurisdictional hurdle that was near impossible to surpass as one of the deficiencies of section 245; this was evidenced in light of the number of bias incidents federal prosecutors were precluded from prosecuting).

⁵³ *See id.* at 6.

⁵⁴ *See* Press Conference with House Minority Leader Representative Richard Gephardt, in *FEDERAL NEWS SERVICE*, Sept. 12, 2000 (noting that the bill passed the Senate in June of 2000, by a by-partisan vote of 57-42, but the bill failed to pass because House leaders were against hate crime legislation and refused to vote because they felt like such legislation would allow federal intrusion into local police matters). Note, however, that the Hate Crimes Prevention Act, renamed the Local Law Enforcement Act of 2000, extends basic hate crime protections to include sexual orientation, gender, and disability in addition to race, religion, and national origin. *See id.* The new act provides that the resources of the federal government would be available to assist local law enforcement agencies in investigation and prosecution of hate crimes. *See id.*

On September 13, 2000, the House of Representatives joined the Senate and voted to pass a procedural motion that would promote the Act. By doing so, Congress reaffirmed the notion that all Americans are deserving of protection from

crime case at the federal level because of these jurisdictional requirements.⁵⁵

Although these statutes vary in regard to which social groups merit protection and what the appropriate punishment scheme ought to be, they have a common goal of combating bias-crimes. Additionally, all hate crime legislation shares the characteristic of intolerance. Both at the state and federal level, the purpose of enacting these statutes is to send out the message that any crime motivated by discrimination weakens our nation's ideological foundations, and therefore simply cannot be tolerated by our society.⁵⁶

B. *The Hate Crimes Paradigm*

A determination of whether criminal conduct is motivated by bias can be elusive. Occasionally, in hate crime offenses the offenders will admit their bias motivation.⁵⁷ In most instances, however, determining bias involves an inquiry into circumstantial evidence and an examination of the totality of the circumstances surrounding the offense.⁵⁸ In recent years, the

bias-motivated crime and showed that the sudden fear of federal intrusion was suspect at best. See Jeff Mandell, *Nation's Largest Jewish Organization Applauds House Step Toward Passing Hate Crime Legislation*, U.S. NEWSWIRE, Sept. 13, 2000. On October 5, 2000 the proposed legislation was dropped from the defense spending despite President Clinton's stated belief that this was a "serious mistake". *Hate Crimes Legislation Dropped From Defense Spending Bill*, THE CRIMINAL LAW REPORTER, Oct. 10, 2000, at 35.

⁵⁵ See *supra* notes 51 & 52 and accompanying text.

⁵⁶ See Maroney, *supra* note 6, at 586; see also Weisburd & Levin, *supra* note 6, at 27 ("The very existence of bias-crime statutes sends out a clear message to society that a discriminatory motivation for a crime is a proscribable evil in and of itself; one that we as a society will not tolerate."); *supra* note 22 and accompanying text (noting the language of New York's recently enacted Hate Crimes Act 2000). New York's 2000 hate crime legislation reads,

[T]he legislature finds and determines as follows: criminal acts including violence, intimidation and destruction based upon bias and prejudice have become more prevalent in NYS in recent years Current law does not adequately recognize the harm to our public order and individual safety that hate crimes cause. Therefore, our laws must be strengthened to provide clear recognition of the gravity of hate crimes and the compelling importance of preventing their recurrence.

Id.

⁵⁷ See Smith, *supra* note 2, at A1.

⁵⁸ See Julie Goldscheid, *Gender Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 130-32 (1999) (discussing the use of the totality of the evidence in determining if a bias-crime has been committed).

legal community has begun to recognize bias crimes as possessing certain characteristics that speak as evidence of a bias motivation: selection of victim because of an immutable characteristic; interchangeability of the victim; increased fear among the target group; heightened impact on the community resulting in communal fear; heightened psychological trauma to the victims; an underreporting by victims; serial nature of the attacks on victims and by perpetrators; and an increased level of violence.⁵⁹

1. Immutable Characteristic

A bias-crime perpetrator selects his victim based on the individual's immutable characteristic; that is, a trait that cannot be changed.⁶⁰ It is because of this immutable characteristic that the victim cannot rationalize his attack as the result of his own actions or in-actions.⁶¹ Since the attack is not the result of any action taken by the victim, or any random criminal activity, but is based instead upon an immutable characteristic, the victim becomes poignantly aware of her own vulnerability.⁶² Regardless of any precautions taken, the victim feels that she lacks control over her personal safety and individual life because she cannot change the characteristic that prompted the original attack.⁶³

⁵⁹ Many commentators have come to consider any number of characteristics as indicative of a hate crime. See Weisburd & Levin, *supra* note 6, at 23–26 (stating that calling on increased psychological trauma, increased communal harm, interchangeability of victim, terroristic effects on both the individual victim and the larger class to which the victim belongs, and uncooperative victims, as indicators that a bias-crime has transpired); see also Marguerite Angelari, *Hate Crime Statutes: A Promising Tool For Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 63 (1994) (calling on interchangeability of victims, lack of motive, excessive violence, and immutable characteristics as indication of a hate crime).

⁶⁰ See Weisburd & Levin, *supra* note 6, at 24.

⁶¹ See LEVIN & MC DEVITT, *supra* note 4, at 13 (finding that victims cannot ensure their safety by avoiding certain behavior); see also Joseph M. Fernandez, *Bringing Hate Crime Into Focus: The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261, 287 (1991) (stating that “[t]here is nothing this person can do; indeed there is nothing this person ought to do to change about his or her race, religion, ethnicity, or sexual orientation”).

⁶² See Taylor, *supra* note 10, at 161 (noting that victims of hate crimes feel helpless because the crimes are not motivated by the victims' actions).

⁶³ See LEVIN & MCDEVITT, *supra* note 4, at 13.

2. Interchangeability of Victims

Because the motivating factor behind the attack—for instance gender—is common to a larger group of people, individuals within the target community become poignantly aware of their own vulnerability. All women suddenly realize that they could be interchanged with the actual victim of the crime because they share the common trait.⁶⁴

3. Increased Fear to the Target Group

In the perpetrator's mind, lines of individuality are indistinguishable and each member of the target group may be a potential victim for a bias-motivated crime.⁶⁵ It is this aspect in particular which causes hate crimes to instill terror in the victim's smaller community.⁶⁶ The target community's fear is largely a reflection of the realization of their own vulnerability and the acknowledgement that 'it could have been me.' This feeling of vulnerability results from the fact that the community shares the same immutable characteristic with the victim that prompted the bias attack. As one scholar has noted, "In effect, an attack inspired by animus says in unequivocal terms to each member of the victim's group that 'the same thing could happen to you.'"⁶⁷

4. Communal Fear

Some scholars have commented that hate crimes are far more serious than other crimes that do not involve prejudice simply because bias-crimes are intended to intimidate an entire

⁶⁴ See Peter Finn, *Bias Crime: A Special Target For Prosecutors*, THE PROSECUTOR 10 (Spring 1988) (finding that the fear hate crimes generate can "victimize a whole class of people").

⁶⁵ See Taylor, *supra* note 10, at 579; see also Frederick M. Lawrence, *The Punishment of Hate: Moving Toward A Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 322 (1994) (noting that an additional harm results because a personalized threat is felt by persons other than the immediate victim).

⁶⁶ For a general discussion of the idea that bias-crimes inflict a palpable harm on the target community (for example all women) of the crime as well as society at large (both men and women) because the reaction of the target community goes beyond mere sympathy with the immediate bias-crime victim and exceeds empathy as well, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 221 (1990) (arguing that empathy is the key to combating discrimination in the US); see also Weisburd & Levin, *supra* note 6, at 24 ("[B]ias crimes instill a broad-based fear on all members of the victim's group.").

⁶⁷ LEVIN & MCDEVITT, *supra* note 4, at 97.

community.⁶⁸ Bias-crimes instill a broad sense of communal fear within societies.⁶⁹ Even people that are not directly threatened by such bias related violence suffer fear and anxiety.⁷⁰ Primarily, this anxiety results because such crimes violate society's general concern for the security of its members and their property.⁷¹ This heightened impact is most clearly recognized when one examines the national reactions to recent hate crime incidents. For example, the murder of Matthew Shepard did not draw national attention only because it was gruesome. Rather, the great degree of national attention to the incident is properly attributed to the motivation behind the crime and the subtle psychological affects such motivation has on members of society.

5. Heightened Psychological Trauma

The victim of a bias-crime experiences complete degradation and vulnerability.⁷² The most traumatic aspect of being a victim of a hate crime is that the person must endure, "not only the increased level of violence itself, but also a lingering sense of fear and vulnerability."⁷³ It is this increased and omnipresent sense of vulnerability that causes a bias-crime victim to exhibit greater trauma than a non-bias-crime victim. According to one survey, bias-crime victims experience twenty-one percent more physiological symptoms than victims of non-bias crimes.⁷⁴ Similarly, another study shows that bias-crime victims suffer far

⁶⁸ See Pendo, *supra* note 7, at 157.

⁶⁹ See *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993) (stating that "bias inspired conduct . . . is thought to inflict greater individual and societal harm").

⁷⁰ See U.S. DEPT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 24 (2d ed. 1988) (noting that people that are not directly threatened by bias attacks suffer increased anxiety that is the result of the "breakdown of community order and civility in their surroundings"); see also Weisburd & Levin, *supra* note 6, at 26 (stating that bias-crimes attack the social order of a community and the resulting distrust instilled in a victim can polarize communities).

⁷¹ See, e.g., Lawrence, *supra* note 65, at 347 (1994) (noting that bias-crimes violate society's general concern for security and also the egalitarian ideal and the anti-discrimination principle that have become fundamental to the American culture).

⁷² See Fernandez, *supra* note 61, at 262 (emphasizing the emotional harms extending beyond the physical injury or resulting property damage).

⁷³ Pendo, *supra* note 7, at 160.

⁷⁴ See Weisburd & Levin, *supra* note 6, at 25 (citing the results of the National Institute Against Prejudice & Violence, National Victimization Survey (1989)).

greater psychological harm than do victims of non-bias crime.⁷⁵ This increased trauma manifests itself because the victim is selected based on his or her very identity, which, in-turn, leads to increased self-blame.⁷⁶ This increased sense of blame very often results in low self-esteem, feelings of helplessness, depression, profound sadness, lack of trust, societal withdrawal, excessive fear of personal and familial safety, increased use of drugs and alcohol, and suicidal tendencies.⁷⁷ What is most troubling about the psychological trauma inflicted on victims of bias-crimes is that the "trauma is never final; recovery is never complete."⁷⁸

6. Underreporting by Victims of Bias-Crimes

Commentators have noted that "[b]ias crimes are also characterized by severe underreporting by victims."⁷⁹ For certain groups of victims the rate of unreported incidents reaches as high as ninety-percent.⁸⁰ This underreporting of bias-motivated victimization is the result of embarrassment, shame, or belief that the authorities cannot do anything to remedy the injustice done.⁸¹ Many victims decline to follow through with initial legal reports because of the trauma that results from dealing with the ill-equipped, unsympathetic justice system.⁸²

⁷⁵ See Kent Greenwalt, *Reflections on Justification for Defining Crimes by the Category of Victim*, 1992/1993 ANN. SURV. AM. L. 617, 627 (describing the "special injury" that results because of the victim's knowledge that the attack was motivated by racial animus); see also Arnold Barnes & Paul Ephross, *The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attacks*, 39 SOC. WORK 247, 250 (1994) (noting that the emotional responses of hate crime victims range from profound sadness to anger or fear).

⁷⁶ See Linda Garnets et al., VIOLENCE AND VICTIMIZATION OF LESBIANS AND GAY MEN: MENTAL CONSEQUENCES 207, 209 (Gregory M. Herek & Kevin T. Berrill eds., 1992); see also Susan E. Martin, *A Cross Burning Is Not Just An Arson: Police Social Construction of Hate Crimes In Baltimore County*, 33 CRIMINOLOGY 303, 305 (1995) (describing the difficulty a bias-crime victim has accepting his victimization, due to the fact that he believes the crime is based on his very identity).

⁷⁷ These are only a few of the resulting phobias and syndromes suffered at the hands of a bias-motivated perpetrator. For a more detailed discussion of the resulting problems, see Joan Weiss et. al., National Institution Against Prejudice & Violence, *Ethnoviolence at Work*, 18 J. INTERGROUP RELATIONS 21, 27 (1991-1992).

⁷⁸ Schafran, *supra* note 17, at 446.

⁷⁹ Weisburd & Levin, *supra* note 6, at 26.

⁸⁰ See *id.* (citing Brian Levin, *A Theoretical & Practical Overview*, 4 STAN. L. & POL'Y REV. 165, 178 n.13 (1992)).

⁸¹ See *id.*

⁸² See Weisburd & Levin, *supra* note 6, at 26 ("[T]rauma result[s] from availing

Others feel that they will be exploited and humiliated at the hands of skeptical defense attorneys.⁸³

7. Serial Nature of Attacks and Recidivist Rate of Assailant

Victims of bias-crimes typically fall prey to multiple attacks,⁸⁴ since bias-crimes often involve multiple attacks against the same victim or the same class of victims.⁸⁵ Studies have shown that as many as two-thirds of bias-crime victims experience recurring attacks.⁸⁶ Similarly, bias-crime perpetrators tend to commit multiple attacks over a long period of time.⁸⁷

8. Heightened Violence

Generally, bias-crimes are more violent than non-bias motivated crimes,⁸⁸ and thus typically require hospitalization.⁸⁹ For example, nearly seventy-five percent of bias-crime victims will suffer an injury at the hands of an attacker while the national average for personal injuries sustained in all other crimes that are not bias-motivated is only twenty-nine percent.⁹⁰ Similarly, victims of bias-crimes require hospital treatment four times as often as victims of non-bias crimes.⁹¹ These statistics reflect the primary goal of a bias-crime: intimidating and degrading an entire class of individuals.⁹²

themselves of an often unsupportive, uncaring or unsympathetic legal system.”).

⁸³ See *id.* (“[T]he personal degradation of the victim often becomes the subject of legal maneuvering as defense counsel attempts to find a benign justification for the attack, including an intense examination of the victim’s actions.”).

⁸⁴ See Taylor, *supra* note 10, at 584.

⁸⁵ See generally Weisburd & Levin, *supra* note 6, at 26 (noting that many bias-crime victims suffer attacks more than once); Taylor, *supra* note 10; Lawrence, *supra* note 65, at 320.

⁸⁶ See Taylor, *supra* note 10, at 584 (discussing the two-thirds statistic).

⁸⁷ See Barnes & Ephross, *supra* note 75, at 249.

⁸⁸ See Weisburd & Levin, *supra* note 6, at 23; see also BRIAN LEVIN, A PRACTICAL APPROACH TO BIAS CRIMES 3–4 (1992).

⁸⁹ See Weisburd & Levin, *supra* note 6, at 23 (stating that a bias assault is “twice as likely to involve injury to the victim and four times as likely to require hospitalization”).

⁹⁰ See Daniel Goldman, *Hate Crimes Matter of Turf, Researchers Say*, CHI. TRIB. June 1, 1990 at C29.

⁹¹ See LEVIN & MC DEVITT, *supra* note 4, at 11 (noting that thirty-percent of bias-crimes result in hospital treatment while only seven percent of parallel crimes require the same).

⁹² See Angelari, *supra* note 59, at 66 (“[T]he intent of such hate-based crimes is to control and terrorize the members of . . . groups.”).

II. RAPE AND HATE

A. *Brief History of Rape Law Reform*

In the eighteenth century rape was defined as "carnal knowledge of a woman forcibly and against her will."⁹³ Under this traditional approach, the female had to prove that she did not consent *and* that the sexual act was "by force" or "against her will."⁹⁴ Generally speaking, it was sufficient proof of force if one could demonstrate that the male used, or threatened to use, force likely to cause *serious* bodily injury to the female.⁹⁵ In addition to these requirements, there was another element that had to be present for a rape conviction to stand: the victim had to have resisted the male's aggression and have been overcome only by force or threats to her safety.⁹⁶

Until the 1950s this approach to rape was almost uniformly applied in the United States and because of the difficulty of establishing the necessary requirements, few prosecutions were successful.⁹⁷ Despite these hurdles, the legal establishment remained fearful of false reports,⁹⁸ and so the courts imposed heightened proof requirements⁹⁹ including: an immediate reporting to the authorities by the victim of the alleged incident;

⁹³ WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 210 (London: Cavendish Publishing, Ltd. 2001) (1765).

⁹⁴ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 577 (3d ed. 2001).

⁹⁵ See *id.*

⁹⁶ See *id.* The one exception to these definitional requirements of rape was known as the marital immunity doctrine. See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 29–30 (1998). This exception was based on the notion that a virgin daughter was owned by her father. See *Deuteronomy* 22:28–29 (discussing the punishment of paying fifty shekels to the father, "owner," and a forced marriage to the daughter if one raped a virgin). Consequently, the rule was a manifestation that the husband took over for the father upon marriage and came to own the sexual rights of his wife and therefore a husband could not be charged with a violation of his own rights. See DRESSLER, *supra* note 94, at 588.

⁹⁷ See SCHULHOFER, *supra* note 96, at 18–20; see also Erin Motley and Christina Wells, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 146 (2001) (noting a 1973 study that found men who committed rape had between a two and thirteen percent chance of being convicted).

⁹⁸ See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1028 (1991) (noting that only two-percent of rape reports prove to be false and that the justice system is adequately equipped to determine such falsehoods early on).

⁹⁹ See SCHULHOFER, *supra* note 96, at 18.

corroboration of the victim's story, usually by a medical examiner; and a qualification of *utmost* resistance by the victim to the assailant's aggression.¹⁰⁰ In hindsight, scholars have noted that it was the resistance requirement that likely prevented successful prosecutions of rape cases.¹⁰¹ For example in *Whittaker v. State*,¹⁰² a woman was held down and threatened with a revolver.¹⁰³ After numerous attempts to cry out and escape, she became physically exhausted and no longer able to fight to save herself; she reluctantly submitted.¹⁰⁴ The court found this submission, despite the reluctance surrounding it, to be insufficient to sustain a rape conviction because the woman did not resist to the *utmost extent*.¹⁰⁵

Disheartened by the likelihood of defeat and the belief that rape laws were archaic, the American Law Institute (ALI) began to draft reform proposals.¹⁰⁶ These proposals were aimed at eliminating the requirement of resistance, dividing rape into two separate offenses: stranger rape and acquaintance rape, and abolishing any mention of consent.¹⁰⁷ The hope was that if consent was not examined, but rather the actions of the defendant were the focus of the interrogation, the jury would not become preoccupied with whether the victim "asked for it."¹⁰⁸ The ALI used the term forcible compulsion,¹⁰⁹ expanding the definition of force, and kept the focus upon the defendant and made the presence of force determinative of whether the woman consented.¹¹⁰ If she submitted because of physical force or the

¹⁰⁰ See *id.* at 18–19 (detailing the various proof requirements).

¹⁰¹ See *id.* at 17–46.

¹⁰² 7 N.W. 431, 431–33 (Wis. 1880).

¹⁰³ See *id.*

¹⁰⁴ See *id.* For a further discussion of the force requirement and its application in *Whittaker*, see SCHULHOFER, *supra* note 96.

¹⁰⁵ See SCHULHOFER, *supra* note 96.

¹⁰⁶ See *id.* at 20–21.

¹⁰⁷ See *id.* at 21.

¹⁰⁸ See *infra* notes 192–99 and accompanying text.

¹⁰⁹ Forcible compulsion was included as a way to show that there was a lack of consent. Under the New York Penal Law's definition of forcible compulsion, implying non-consent can be satisfied by showing one of two things: (1) the defendant used actual physical force to compel the victim; or (2) there was a threat, either implied or expressed, that placed the victim in fear of immediate death or physical injury (meaning physical impairment or substantial pain) to him/herself or another person. N.Y. PENAL LAW § 130.00(8) (McKinney 1998).

¹¹⁰ See SCHULHOFER, *supra* note 96, at 23.

threat of physical force, lack of consent was implied.¹¹¹

The ALI's work provided a framework for much of the reforms that occurred during the 1960's.¹¹² The reforms of the 1960's did not eliminate the marital exemption, the requirement of corroboration, the demonstration of non-consent, or the requirement of immediate reporting.¹¹³ But many states following the lead of the ALI began to minimize the need to show resistance by including the requirement of forcible compulsion—making force determinative of non-consent.¹¹⁴ This inclusion resulted in a fixation upon the physical violence surrounding the alleged rape, but the problem of *what is force or how much force is enough* persisted¹¹⁵ and rape prosecutions continued to fail. Accordingly, criticism of the existing rape laws intensified.¹¹⁶

The next generation of rape-reform activists believed the problem with the law was largely the result of social convictions that were ingrained in the criminal justice system.¹¹⁷ For example, prosecutors and police officers often felt that women who dressed provocatively, engaged in suggestive behavior, consumed alcoholic beverages, or had lost their virginity prior to the incident essentially got what they deserved by being raped.¹¹⁸ Any indictments that were able to overcome these early-stage prejudices of officials were met with additional prejudice at trial where rape cases were often the subject of abusive and degrading cross-examinations and procedural abuses of defense counsels.¹¹⁹ Rape reformers of the 1970s, therefore, aimed to eliminate rules of evidence that hindered rape prosecutions.¹²⁰ By the mid-1970s the corroboration rule and cautionary instructions given to jurors¹²¹ were largely

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.* at 24.

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 25. For examples of failed prosecutions that were tried in the 1960s and 1970's, see *id.* at 24.

¹¹⁷ See *id.* at 25 (stating that "[u]nwanted sexual imposition was not in itself a crime—or even an aberration").

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 26–29.

¹²⁰ See SCHULHOFER, *supra* note 96, at 29–30 (noting that "in the course of the 1970's virtually every state repealed these discriminatory rules").

¹²¹ See *id.* at 18–19 (noting that the cautionary rule instructed jurors that they must examine the victim's story with great precaution).

eliminated.¹²² Another feat of the 1970s reforms was the development of rape shield laws that protected a rape victim while on the witness stand by limiting the scope of questions that could be asked.¹²³ Despite these great strides, most states retained the spousal immunity privilege, although it was softened or eliminated in certain states.¹²⁴ Similarly, the majority of states retained a resistance requirement albeit less restrictive, of only *reasonable* resistance, while other states abandoned the requirement altogether.¹²⁵ Unfortunately, the reforms had little practical effect when examined in light of cases prosecuted under the new reforms.¹²⁶

While the 1960s reforms eliminated a per se inquiry into the victim's consent by asking whether there was forcible compulsion,¹²⁷ and the 1970s eliminated some procedural barriers, problems remained—namely, the definition of forcible compulsion.¹²⁸ In virtually all states, rape laws remained limited to situations of actual or potential physical violence,¹²⁹ which prevented a great number of “actual rapes” from meeting the threshold requirements necessary to sustain a conviction. Often a woman, fearing for her safety, would submit and have no physical wounds that were prototypical of a “real” rape, no knife marks, black eyes, broken-nose, bruises on the throat or scratches. Thus, her “story” would not meet the forcible compulsion requirement. Some jurisdictions have taken

¹²² See *id.* at 30. The reason behind this cautionary rule was the societal idea that rape charges are “easily to be made and hard to be proved, and harder to be defended by the party accused tho’ never so innocent.” SIR MATTHEW HALE, *THE HISTORY OF PLEAS OF THE CROWN*, I, LVIII 635 (R.H. Small ed., 1847).

¹²³ See SCHULHOFER, *supra* note 96, at 30. For example, under state rape shield laws the past sexual history of the victim, apart from prior relations with the defendant, cannot be addressed. See *id.*; see also Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245 (1989).

¹²⁴ See *id.*; DRESSLER, *supra* note 96, at 580–81 (noting that the common law resistance rule was unjustifiable because women react differently in rape situations, and requiring a woman to fight back would substantially increase her risk of sustaining serious injuries).

¹²⁵ See *id.*

¹²⁶ See SCHULHOFER, *supra* note 96, at 33 (describing major changes in the law that “had surprisingly little practical effects”). For cases exemplifying the practical failure of the reforms see *State v. Rusk*, 424 A.2d 720 (Md. 1981), *State v. Alston*, 312 S.E.2d 470 (N.C. 1984); *People v. Hearn*, 300 N.W.2d 396 (Mich. App. 1981).

¹²⁷ See SCHULHOFER, *supra* note 96, at 31.

¹²⁸ See DRESSLER, *supra* note 94, at 582–30.

¹²⁹ See SCHULHOFER, *supra* note 96, at 44. (stating that only New Jersey has abandoned the force requirement).

innovative approaches to remedy this problem. For example, in a few jurisdictions a rape prosecution may stand on the basis of lack of consent by the female and the force required inherent in the sexual act.¹³⁰ In yet another jurisdiction there is no force requirement whatsoever, and a rape conviction will stand on the basis of the female's lack of permission for the intercourse.¹³¹ Nevertheless, the typical current definition of rape includes three elements: proof that a proscribed sex act occurred (typically penetration); proof that force, actual or threatened, was used to perform the act; and proof that the act occurred without the consent or against the will of the victim.¹³²

Unfortunately, rape victims are still met with disbelieving ears and faced with numerous hurdles. Therefore, reform of rape law is still very much needed.¹³³ In light of the prevalence

¹³⁰ See *State v. Brown*, 420 S.E.2d 147 (N.C. 1992).

¹³¹ See *State in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992) (stating that physical force is not required in addition to "involuntary or unwanted sexual penetration."). In taking this approach, New Jersey adopted the Wisconsin scheme. See Major Timothy W. Murphy, USAF, *A Matter of Force: The Redemption of Rape*, 39 A.F. L. REV. 19, 23 (1996).

The statutory requirements regarding force and nonconsent vary among jurisdictions. In Alabama, Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Michigan, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington, and Wyoming, only force is included in the statutory definition of rape. See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 1000-01 n.280 (1998). In Mississippi, Montana, Nebraska, Nevada, and Utah only nonconsent is included in the definition. See *id.* at 1000-01 n.281. Alaska, Arizona, Delaware, Florida, Georgia, Kansas, Louisiana, Maryland, Massachusetts, New York, North Carolina, Texas, Virginia, West Virginia, Wisconsin, and the Uniform Code of Military Justice list both force and consent in the statutory definition of rape. See *id.* at 1001 n.282. Tennessee and Vermont "appear to require a version of either force or non-consent." *Id.* at 1001 n.283. In most jurisdictions, regardless of these distinctions, rape will be found if both force and non-consent occur; if only one occurs rape will not be found. See *id.* at 1001.

¹³² See *State v. Thomas*, 731 A.2d 532, 536 (N.J. App. Div. 1999). If physical force, or the threat of such force, is found, such as would overcome the will of a reasonable woman, then lack of consent is assumed and does not have to be individually proven.

¹³³ See Phylis Skloot Bamberger, *Never Underestimate the Injury in Rape*, N.Y. TIMES, Mar. 9, 1990 (Editorial), at A34. Bamberger states,

The suggestion that the rape itself is not a "serious injury" is beyond comprehension . . . The physical violence inherent in rape is generally no longer belittled, but the attitude that is expressed in your articles [describing a rape victim as "cut on arms and hands but not seriously injured"] is a reflection of an unfortunate view of community attitudes lurking below the surface.

Id.

of rape, the next step in rape reform is justified. In the United States alone, rape violates and defiles one out of every 270 women¹³⁴ because they are women,¹³⁵ affecting 12.1 million women annually,¹³⁶ 4.7 million women more than once,¹³⁷ and transpiring once every five minutes nationally.¹³⁸ Society needs to accept that rape is a violent, terrorizing crime that occurs not because women ask for it, neither is rape any less "real" simply because the woman is able to walk away from the crime without visible scars.

¹³⁴ See CRAVEN, *supra* note 17.

¹³⁵ Rape is a problem, and not an insignificant one, which also affects men. When compared to the rape of women, however, it is obvious that the occurrence of male rape and the occurrence of female rape are problems of far different magnitude. One study suggests that approximately 10,000 men are raped annually. See JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 48 (noting the results of an unspecified 1988 U.S. Department of Justice report). When compared to the 12.1 million women that are raped annually, the problem of female rape is far more prevalent. See Schafran, *supra* note 17, at 448. Another study reveals that approximately 33,000 men and 432,000 women are raped annually. See U.S. Dep't of Justice, *Sex Differences in Violent Victimization*, 1994, at <http://www.ojp.usdoj.gov/bjs/pub/ascii/sdvv.txt>. Regardless of the statistical data one relies upon, it is clear that the commission of rape against women is a more prevalent problem than the rape of men. This conclusion is buttressed by the sad reality that a number of studies reveal that the males most likely to be raped are those under the age of 13. See Arthur Kaufman et al., *Male Rape Victims: Noninstitutionalized Assault*, 137 AM. J. PSYCHIATRY 221, 221 (1980) (noting that less than ten percent of females that are raped are under the age of thirteen, while at least fifty percent of reported rapes of males are committed against boys thirteen or younger). These figures suggest that a large number of rapes committed against males would be more appropriately categorized as child abuse. See J. James et al., *Physician Reporting of Sexual Abuse Children*, 240 J.A.M.A. 1145, 1145-46 (1978). Child abuse is a problem that plagues our nation, but would be best treated as a separate and distinct crime than the rape of a non-consenting adult.

Another distinction between female rape victims and male rape victims is that a good number of male rape victims are raped as an aberration of prison life or as a violent outgrowth of the homosexual subculture. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (Simon and Schuster 1975). This does not suggest that rape of males outside of child abuse, prison life, and homosexual violence does not exist, as it certainly does. But the rape of men is far less frequent or commonplace of a problem than the rape of women. See CRAVEN, *supra* note 17 (noting that the victimization of men exceeds women in all crimes except that of rape and sexual assault).

¹³⁶ See Schafran, *supra* note 17, at 448 (noting the results of Rape in America, a nationwide study directed at reporting the incidence of rape in America).

¹³⁷ See *id.*; see also TJADEN & THOENNES, *supra* note 17; CRAVEN, *supra* note 17 (noting that victimization of men exceeds women in all crimes except rape).

¹³⁸ See Stellings, *supra* note 17.

B. Rape as a Crime of Hate

Fortunately, reforms *were* able to transform conceptions of rape from a crime of uncontrolled sexual passion to a crime of violence.¹³⁹ The next step in rape reform is to ensure that rape is viewed not only as a crime of violence, but a crime of hate, targeting women on the basis of their gender. We, as a society, must come to accept that rape is a violent form of discrimination parallel to other bias-related crimes.¹⁴⁰ Whether intentional or not, the recent inclusion of gender within hate crime legislation provides an ideal basis for the next phase of rape reform. The states that protect gender should begin to prosecute rape as a hate crime, and the states that do not include gender in their hate crime legislation should do so at once.

Contrary to popular belief, stranger rape comprises less than one quarter of all rapes that are perpetrated.¹⁴¹ Seventy-eight percent of victims know their perpetrator¹⁴² while only twenty-two percent fall prey to a stranger.¹⁴³ As one commentator has noted, rape and the fear of rape was and remains to be a tool that "help[s] to subordinate women as a group."¹⁴⁴ This subordination is clear when one takes notice of women's attempts to alter their lifestyles to avoid becoming statistics.¹⁴⁵ Studies show that women accommodate the fear of rape by restricting their behavior.¹⁴⁶ For example,

¹³⁹ See National Victim Center, 1 INFOLINK 1, 1 (No. 36, 1992) ("Rape is a violent crime not a sexual act. The myth that men who rape women are sexually deprived or pathological has begun to be dispelled and replaced with an understanding that rape is an act of power and control, rather than lust."); see also BROWNMILLER, *supra* note 135 (stating that rape was traditionally a crime of uncontrolled sexual passion and now it is a crime of violence).

¹⁴⁰ See Goldscheid, *supra* note 58, at 123.

¹⁴¹ See CRAVEN, *supra* note 17 (noting that about nine percent of rapes are committed by a family member, twenty-nine percent at the hands of an intimate, and forty percent are committed by an acquaintance); see also TJADEN & THOENNES, *supra* note 17 (noting that nearly twenty-five percent of the surveyed women—only including victims who reported rape by intimates as a crime—reported that they had been raped by a current or former spouse, cohabiting partner, or date, at some time in their lives, with 1.5 % reporting they had been victimized in the previous year).

¹⁴² See CRAVEN, *supra* note 17.

¹⁴³ See *id.*

¹⁴⁴ Pendo, *supra* note 7, at 172.

¹⁴⁵ See THE VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. At 38-39 (1991) (statement of Bonnie J. Campbell, Attorney General of Iowa).

¹⁴⁶ See *id.* (stating as examples: avoiding public transportation, not walking in

approximately three-quarters of women refuse to attend movies at night without a companion because of the fear of rape,¹⁴⁷ and approximately fifty percent of women, if alone, will not ride public transit, if alone, after dark for the same reason.¹⁴⁸

C. Rape and the Hate Crime Paradigm

Rape is clearly and logically a crime of hate. More than any other gender-related offense, rape is committed against women as women¹⁴⁹ and perpetuates a sexually stratified society. As pointed out by one scholar, "Statistics on female victims of violent crimes exhibit a consistent and unusual pattern that suggests women are targeted for sexual violence based on their gender."¹⁵⁰ Ninety-seven percent of rape victims are women,¹⁵¹ which demonstrates that rape is largely a crime of male-attacks of female-victims.¹⁵² One commentator has noted that any time a person proceeds to act "in the face of his victim's clear lack of consent, he is consciously hurting and degrading the woman; whenever the rapist intentionally commits the crime, he knows

her neighborhood after dark, or walking near parks of empty lots).

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See Jonathan David Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crime Statutes After R.A.V.*, 72 ORE. L. REV. 157, 159 n.8 (1992) (defining rape as a hate crime because it is "perpetrated against women on the basis of their gender and it must be prosecuted under both rape and hate crimes law if the law is to effectively respond to its unique dual character"). While men are raped it is a crime of far less prevalence. See *supra* note 130 and accompanying text.

¹⁵⁰ Pendo, *supra* note 7, at 166.

¹⁵¹ Women and Violence: Hearing Before the Comm. of the Judiciary of the U.S. Senate on Legislation to Reduce the Growing Pattern of Violent Crime Against Women Part I, 101st Cong., 2d Sess. 2 (1990) (opening statement of Comm. Chairman, Sen. Biden).

¹⁵² Catharine MacKinnon, *supra* note 19 at 1301-02. Additionally, even in the instance of intragender rapes, the rapist is typically male. See ALLISON & WRIGHTSMAN, *supra* note 134, at 48 (noting that intragender rape of men is a problem that is acknowledged, but there is very little known about females being sexually assaulted by other females). For an interesting view that the act is still gender biased when committed against a male see Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, in FEMINIST LEGAL THEORY: READINGS IN THE LAW AND GENDER 334 (Katharine T. Bartlett & Roseanne Kennedy eds., 1991) (quoting Carolyn M. Shafer & Marilyn Frye, *Rape and Respect*, in FEMINISM AND PHILOSOPHY (Mary Vetterling-Braggin et al. eds., 1977) ("Rape is a man's act, whether it male or female man and whether it is man relatively permanently or relatively temporarily; and being raped is a woman's experience, whether it is a female or male woman and whether it is a woman relatively permanently or relatively temporarily.")).

that he is committing violence against the victim, the sort of which he would only commit against a woman,"¹⁵³ therefore every rape is a crime of hate. To argue that rape is not a crime of hate but really an incident of miscommunication or amorous intentions in a sexual coupling run afoul¹⁵⁴ (as many in society believe is the case with a date or acquaintance rape)¹⁵⁵ is precisely the attitude that treating rape as a hate crime would help to eradicate. One judge discredits the idea that date rape is not discriminatory:

The notion that non-consensual sexually oriented conduct is actually amorous and therefore not invidiously discriminatory toward the victimized class is clearly wrong In fact, the perception that a man is somehow less culpable in taking inappropriate liberties with members of the female gender if his motivations are amorous, seems to be just the type of 'animus' that is a focus of concern in gender discrimination. Regardless of the amorous intentions of the perpetrator, non-consensual expressions of affection that rise to the nature of those alleged in this action are laden with disrespect for women.¹⁵⁶

To further buttress this supposition that rape is truly a crime of hate, consider the analysis of rape under the eight elements. There is a clear fit between the hate crime paradigm and the crime of rape.

1. Immutable Characteristic

Rape victims are much like victims of other bias-motivated crimes in that they are chosen, not because of who they are individually, but because of their inclusion within a certain group.¹⁵⁷ As noted by one scholar:

¹⁵³ Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 267 (1993).

¹⁵⁴ See Goldscheid, *supra* note 58, at 132-35 (acknowledging an argument that rape is not motivated by gender but rather by an uncontrollable sexual impulse); see also Rothschild, *supra* note 153, at 269-70.

¹⁵⁵ See *supra* notes 149-53 and accompanying text, which discuss the need to include rape as a crime of hate in order to eliminate the societal myths, such as this one, that encapsulate rape.

¹⁵⁶ *McCann v. Rosquist*, 998 F. Supp. 1246, 1252-53 (D. Utah 1998) *rev'd*, 185 F.3d 1113 (10th Cir. 1999), *vacated*, *Rosquist D.C.P.C. v. McCann*, 529 U.S. 1126 (2000) (noting that sexual advances in the face of non-consent, no matter how innocent, are truly discriminatory).

¹⁵⁷ See Goldscheid, *supra* note 58, at 123-24 (stating that regardless of the bias-motivation, the victims are chosen because of their class status); see also Hate

Women are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender Just as women are sexually harassed based on their sex, women are sexually assaulted based on their sex Any woman within the ambit of such a man is his potential victim and, when she is harassed, is disadvantaged because of her sex. But for her sex, she would not be so treated.¹⁵⁸

Because rape is predicated upon a characteristic common to all women—their gender—the fear of becoming a victim is instilled upon the target group of women at large. Women certainly feel more vulnerable after learning that a rape has occurred because they cannot alter their gender, which was the motivation behind the rape.¹⁵⁹

2. Interchangeability of Victim

The leading argument *against* treating rape as a hate crime is that a rape victim cannot necessarily be interchanged with any other female particularly when the rape is committed by an acquaintance.¹⁶⁰ Opponents argue that acquaintance rape and domestic violence, while certainly despicable, are automatically excluded the definition of a hate crime because the offender is not looking for *any* woman. Rather the offender is looking for this specific woman; therefore the victim cannot be interchangeable and does not fit the requirements of a hate crime.¹⁶¹ This argument, however, fails for a number of reasons.

Crimes Statistic Act of 1988: Hearings before the Subcomm. on the Constitutionality of the Comm. On the Judiciary of the U.S. Senate, S. 702, S. 797 and S. 2000, 100th Cong., 2d Sess. 266 (1988) (quoting testimony of Joan C. Weiss, Executive Director of the National Institute Against Prejudice and Violence) (noting that impact of ethnoviolence is parallel to the impact of a rape).

¹⁵⁸ MacKinnon, *supra* note 19, at 1301–13.

¹⁵⁹ See Taylor, *supra* note 10, at 597. (explaining that despite efforts to alter behavior, women cannot necessarily escape sexual attack since they are unable to change their “immutable characteristics” which cause the attacks).

¹⁶⁰ See, e.g., Weisburd & Levin, *supra* note 6, at 36; Kathleen Hendrix, *Defining Controversy; Professor Raises Furor By Claiming Date Rape Statistics Are Inflated*, L.A. TIMES, July 9, 1991, at E1 (reporting on statement of Professor Neil Gilbert that “comparing real rape to date rape is like comparing cancer to the common cold.”); Rothschild, *supra* note 86 at 277 (arguing that certain instances of rape can be treated as hate crimes based upon an examination of the facts, but that acquaintance rape while deserving of a label of rape do not satisfy the requirements necessary to be designated a hate crime).

¹⁶¹ See Weisburd & Levin, *supra* note 6, at 37 (quoting Professor McDevitt of Northeastern University); see also CENTER FOR WOMEN POLICY STUDIES, VIOLENCE

To assume that a rape victim is not interchangeable fails to acknowledge the fact that while a woman does not have to fear that she could have been *that particular* woman, it suffices to say she felt an increased vulnerability because she realized she could have been raped walking down *her* block or by *her* most recent date.¹⁶² Similarly, a woman that has committed to a unhealthy marital relationship does not have to feel that she could have been raped by the man she learns about, rather it suffices if she feels that she, too, is vulnerable to spousal rape in *her own marriage*.¹⁶³ It is precisely this feeling of affect by the target community that demonstrates the interchangeability of victims.¹⁶⁴

Similarly, to argue that females are not interchangeable in the commission of a rape is to ignore how many women try to alter their lifestyles to avoid becoming a victim of a rape precisely because they are aware of their vulnerability.¹⁶⁵ To argue that acquaintance rapes are excluded from being treated as a hate crime because they are committed upon a specific victim with whom the defendant has a relationship (of some degree) fails to take account of other hate crimes in which the perpetrator and victim are acquaintances. For example, a white man burning a cross on his African American neighbor's lawn, or a high school student-athlete desecrating a teammate's place of worship, are both accepted as hate crimes in which the victims could have been interchanged despite the familiarity between victim and perpetrator.¹⁶⁶ If anything, because security is associated with social interactions, the effects of a crime are intensified when committed by someone the victim knows.

AGAINST WOMEN AS BIAS MOTIVATED CRIME; DEFINING THE ISSUE 13 (1991) (stating that opponents feel that if there is a preexisting relationship, the interchangeability requirement automatically fails); ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIME STATUTES: INCLUDING WOMEN AS VICTIMS 12 (1990) (noting that the salient factor in a spousal or acquaintance rape is the relationship between the individual and the perpetrator, whether the defendant was a woman hater is irrelevant).

¹⁶² See Taylor, *supra* note 10, at 596 (acknowledging the implicit threat to women as a group after a violent attack of an individual woman).

¹⁶³ See *id.*

¹⁶⁴ See Finn, *supra* note 64, at 10 (finding that the fear instilled in a community because of a hate crime demonstrates the fear of being interchanged with the victim).

¹⁶⁵ See *supra* notes 145-49 and accompanying text.

¹⁶⁶ See Pendo, *supra* note 7, at 168.

Although, unfamiliarity between the victim and the perpetrator certainly characterizes many hate crimes, it does not undercut the interchangeability of the victim.¹⁶⁷ To argue such a position fails to acknowledge the various studies reflecting the mental processes of a rapist.¹⁶⁸ For instance, some studies indicate that rapists rape because women are collectively responsible for the hardships and problems that the rapist has experienced in his life.¹⁶⁹ Surveys of college students, among whom acquaintance rape is quite frequent, demonstrate that men do not base their decisions to commit rapes on the individual, but admit that any woman will do¹⁷⁰—demonstrating that victims are interchangeable.¹⁷¹

3. Increased Fear Among the Target Group

Because the motivating factor behind a rape is the victim's gender, the target community—namely those people who share this trait—feel a sudden sense of anxiety and fear.¹⁷² Women as a group come to realize their own vulnerability, acknowledging that 'it could have been me,' when they learn of a rape. Women acknowledge that they, like the victim, share a common characteristic that the perpetrator is seeking to violate and very often will take steps to protect themselves that are of little or no help because the immutable characteristic cannot be altered.¹⁷³

¹⁶⁷ See Weisburd & Levin, *supra* note 6, at 37 (noting that victim interchangeability is found in many bias crimes and therefore should be viewed as an inclusive, rather than preclusive, factor).

¹⁶⁸ See David Lisak, Ph.D. Assoc. Prof. Clinical Psych., U. Mass., Boston, and Dir., Men's Sexual Trauma Proj., INTERVIEW WITH A RAPIST: *Transcript from a Study of Acquaintance Rapists* (Boston: Univ. of Mass. 1997); see also Diana Scully & Joseph Marolla, *Riding the Bull at Gilley's: Convicted Rapists Describe the Rewards of Rape*, 32 SOC. PROB. 252, 261 (1985).

¹⁶⁹ See Scully & Marolla, *supra* note 168 ("Women are seen as collectively liable for the rapists' problems In other cases, victims were thought to represent all women, and rape was used to punish, humiliate and 'put them in their place.'").

¹⁷⁰ See Lisak, *supra* note 168 (documenting techniques used by fraternity rapists to target women, any women, for invitations to frat parties at which they ply women with alcohol and take them to pre-designated rooms to have sexual intercourse with them, notwithstanding their objections).

¹⁷¹ Even if one were to accept the assertion that women are not interchangeable the argument still misses the point; these eight characteristics are inclusive and the lack of one should not necessarily preclude hate crimes prosecution.

¹⁷² See Taylor, *supra* note 10, at 596.

¹⁷³ See Rothschild, *supra* note 153, at 268 (stating that women learn rules about how to protect themselves and how to restrict their lives at a young age). "In short, women learn their place and their fear very early. Women . . . know they cannot go

4. Heightened Communal Impact

Similarly, the community at large feels a heightened sense of impact when a rape has occurred. Rape, more so than any other bias-crime, will affect society at large.¹⁷⁴ This impact is so devastating in the instance of a rape because there are very few men that do not have, at least to some degree, a relationship with a woman, whether mother, sister, wife, friend, etc. Therefore when a rape transpires, women and men alike, sense the fear and sadness that accompanies a harm of this magnitude. Women obviously fear for themselves and other women while men grow concerned that the victim could have been their mother, sister, wife, or daughter.¹⁷⁵

5. Heightened Psychological Trauma

Bias-crime victims have been compared to rape victims in a number of studies because the physical harm associated with the crime, however great, is less significant than the powerful accompanying emotional sense of violation.¹⁷⁶ Many commentators have noted that " 'rape. . . is a degrading, violent act, which violates the bodily integrity of the victim and frequently causes severe, long-lasting . . . psychic harm.' "¹⁷⁷ The effects of rape, in addition to any immediate physical injury, risk of pregnancy, or threat of sexually transmitted disease, are severe and long lasting.¹⁷⁸ Like bias-crime victims, rape victims report various forms of serious emotional harm or some form of

places men can go without the fear of being attacked and violated. Campuses, parking lots, libraries, shopping centers, parks, jogging trails—all are possible danger zones." *Id.*

¹⁷⁴ See Joan C. Weiss, *Ethnoviolence: Impact Upon and Response of Victims and the Community*, in AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, 174, 182 (Robert J. Kelly ed., 1993) (comparing rape to ethnoviolence and noting that both affect the whole community).

¹⁷⁵ See Rothschild, *supra* note 153, at 268 (explaining that violence against women terrorizes women as a whole).

¹⁷⁶ See *id.*

¹⁷⁷ Schafran, *supra* note 17, at 439 n.7 (quoting Justice Figueroa in *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984)).

¹⁷⁸ See Weisburd & Levin, *supra* note 6, at 30 (discussing the possibility of resulting pregnancy or the risk of contracting HIV because of a rape). For a more thorough discussion of the psychological after-effects of rape, see Martha A. Holmes & Janet S. St. Lawrence, *Treatment of Rape Induced Trauma: Proposed Behavioral Conceptualization and Review of the Literature*, 3 CLINICAL PSYCHOL. REV. 417 (1983).

Post-Traumatic Stress Disorder (PTSD).¹⁷⁹ PTSD, a chronic psychological condition, is typically characterized by diminished self-worth, fearfulness and anxiety, hostility and blame, sleeplessness, phobic responses, coping difficulties, depressed expectations for the future, extreme fear, and helplessness.¹⁸⁰ Self-blame, impaired relationships, and sexual dysfunction are also typical after-effects of a rape.¹⁸¹ One study revealed that, similar to bias-crime victims, one-half of rape survivors contemplate suicide.¹⁸² The National Victim Center reports that one-third of all rape victims will develop rape-related PTSD and are thirteen-times more likely than victims of ordinary assaults to develop major alcohol dependency and abuse problems.¹⁸³ Similarly, rape victims are twenty-six times more likely than other assault victims to develop major drug problems, usually resulting from prescribed medication used to quell the mental pain associated with a rape.¹⁸⁴ Additionally, rape victims are likely to experience psychological symptoms such as depression or withdrawal and will often be overly sensitive in anticipation of contact with other members of society.¹⁸⁵

These psychological impacts are suffered regardless of whether the victim knew her assailant or not.¹⁸⁶ In fact, women who knew their assailant may suffer more profound effects because they also experience feelings of betrayal and heightened self-blame.¹⁸⁷ One commentator has noted that the impact of rape by a known assailant can be more traumatizing than the impact of rape by a stranger:

¹⁷⁹ See *id.*; see also Pendo, *supra* note 7, at 164; Bridget A. Clarke, Comment, *Making the Women's Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California*, 39 U.C.L.A. L. REV. 251 (1991) (recognizing rape trauma syndrome as a set of identifiable symptoms suffered by victims of sexual assault); MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 40-46 (1989) (same). For judicial recognition of the severe trauma and harms inflicted upon rape survivors, see *Coker v. Georgia*, 433 U.S. 584, 598-99, 611-12 (1977) (Burger, C.J., dissenting).

¹⁸⁰ See Pendo, *supra* note 7, at 164.

¹⁸¹ See Christine Gidycz & Mary P. Koss, *The Effects of Acquaintance Rape on the Female Victim*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 270 (Andrea Parrot & Laurie Bechhofer, eds., 1991).

¹⁸² See *id.* at 275.

¹⁸³ See Weisburd & Levin, *supra* note 6, at 31 n.94.

¹⁸⁴ See *id.*

¹⁸⁵ See Lawrence, *supra* note 65, at 345-47.

¹⁸⁶ See *id.*

¹⁸⁷ See MacKinnon, *supra* note 19, at 188.

Because rape by a known assailant occurs in a context otherwise associated with safety and privacy, the victim may experience an intense sense of betrayal: Women feel as much, if not more, traumatized by being raped by someone we have known and trusted, someone we have shared at least an illusion of mutuality with, than by some stranger.¹⁸⁸

6. Underreporting by Victims

Like all other hate crimes, rape is characterized by significant underreporting.¹⁸⁹ This is attributed to the fact that rape victims feel that the police either could not or would not help them.¹⁹⁰ The victims attribute this distrust to the fact that they often suffer a second time at the hands of an insensitive and gender-biased criminal justice system and because of social beliefs at large.¹⁹¹

Rape victims are correct in their perception. Studies have shown the prevalence of judicial bias against rape victims¹⁹². The victim is often the one put on trial, with jurors focusing on extraneous factors like their clothing, lifestyle and demeanor.¹⁹³ Additionally, studies of jury behavior and attitude reveal poorly disguised hostility toward rape victims, whom juries view as bringing the rape upon themselves by "conduct such as drinking,

¹⁸⁸ Pendo, *supra* note 7, at 173.

¹⁸⁹ See Department of Justice, Sixty Percent of Convicted Sex Offenders Are on Parole or Probation, February 2, 1997, at <http://www.ojp.usdoj.gov/bjs/pub/press/soo.pr> (noting that one-third of rapes are reported). For statistics showing that this number is smaller, approximately one-fifth, when the rapist is an intimate see TJADEN & THOENNES, *supra* note 17.

¹⁹⁰ See TJADEN & THOENNES, *supra* note 17 (demonstrating that in addition to fearing that police either could not or would not help, twenty-one percent of victims expressed concern that the assailant would retaliate while another twenty-six percent said they were too ashamed); see also Shenny F. Colb, *Assuming Facts Not in Evidence*, 25 RUTGERS L.J. 745, 755 (1994) (noting that psychologists attribute the failure of a victim to report rape stems, in part, from the stigma attaching to victims).

¹⁹¹ See The Violence Against Women Act of 1991: The Civil Rights Remedy: A National Call For Protection Against Gender Based Discrimination, S. REP. NO. 197, 102d Cong., 1st Sess. 34-39 (1991); see also Schafran, *supra* note 17, at 441 (noting that in 1987 the average sentence for robbery was twenty-nine percent greater than that for rape).

¹⁹² See Sylvia A. Law, *Commercial Sex: Beyond Decriminalizing*, 73 CAL. L. REV. 523, 576 (2000) (illustrating that until recently, courts would allow defendants to argue, and juries to infer, that women who had not promptly reported an alleged rape had not, in fact, been raped).

¹⁹³ See Weisburd & Levin, *supra* note 6, at 31.

wearing seductive clothing, or accepting a ride with the assailant.”¹⁹⁴

The following examples are illustrative of the social perceptions of rape victims: a Texas gubernatorial candidate was asked about his thoughts on rape and he replied, “Rainy weather is like a woman being raped; if it’s inevitable just relax and enjoy it”¹⁹⁵; a Wisconsin judge while presiding over the brutal rape of a mere baby, labeled the five-year old child “an unusually promiscuous lady,” and found her responsible for the assault¹⁹⁶; and a New York Judge after presiding over a rape trial stated that while the defendant “did go into [the victim’s] apartment without permission . . . I think [the sexual intercourse] started without consent, but maybe they ended up enjoying themselves.”¹⁹⁷ These statements are demonstrative of the barriers rape victims must surmount to have the violent crimes committed against them acknowledged and punished accordingly. Another example of judicial bias is that some judges impose light sentences in the absence of “slash and bash” evidence.¹⁹⁸ But the uphill battle does not end here. Rather, victims are very aware of the many “rape-myths” that pervade society and must ask themselves if it is really worth it to report this rape, or am *I* really going to suffer at the hands of the police and criminal justice system.¹⁹⁹ Unfortunately, in light of severe underreporting of rape incidents, we are already aware of the usual rape victim’s answer.

¹⁹⁴ DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 248 (Harvard Univ. Press 1989).

¹⁹⁵ See ALLISON & WRIGHTSMAN, *supra* note 134, at 1 (quoting an undisclosed 1990 Texas gubernatorial candidate in order to demonstrate the lack of sympathy that accompanies a rape accusation).

¹⁹⁶ See RHODE, *supra* note 194, at 249 (portraying the incident and then ridiculing this unidentified Judge as a disgrace to society).

¹⁹⁷ *Id.*

¹⁹⁸ See Schafran, *supra* note 17, at 441 (“[J]udges’ sentencing practices frequently ignore victims’ psychological injuries and minimize the seriousness of the crime when there is no evidence of physical injury as it is commonly understood, i.e., bashing and slashing.”).

¹⁹⁹ See Kristin Aggeler, *Is ADHD a “Handy Excuse”? Remedying Judicial Bias Against ADHD*, 68 U.M.K.C. L. REV. 459, 477 (2000) (stating that rape myths make it difficult to establish that a rape has occurred because they reinforce the suggestion that a rape victim may be lying). Rape myths have at times been included in a formal jury instruction. See *id.*

7. Serial Nature of Attacks and Recidivism

The worst fear of any traumatized person is that the traumatic event will have to be relived,²⁰⁰ and for the rape victim this is very possible. Research shows that victims that have been raped have a very significant chance of being raped again.²⁰¹ On average, thirty-nine percent of rape victims have been raped more than one time on separate occasions.²⁰² Similarly, an assailant is prone to multiple offenses. For example, approximately eight percent of 2,214 rapists released from prison in 1983 were re-arrested for a new rape within three-years.²⁰³ Compared to other prisoners who served time for another offense rapists were ten and one-half percent more likely to be arrested for a subsequent rape.²⁰⁴

8. Heightened Violence

Rape has been considered a crime of violence since as early as 1975.²⁰⁵ Like all bias-crimes, rape is *excessively* violent in nature.²⁰⁶ Many studies have shown that "rape is one of the *most* brutal, invasive, and degrading forms of victimization,"²⁰⁷ and in addition to the injury that is inherent in the sexual act, many rape victims require significant hospital treatment.²⁰⁸

²⁰⁰ See JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 86 (1992).

²⁰¹ See Schafran, *supra* note 17, at 448.

²⁰² See *id.* For a more thorough discussion on the rate and reasons for multiple victimization, see National Victim Center and Crime Victims Res. and Treatment Center, Med. Univ. of South Carolina, in *RAPE IN AMERICA* (1992).

²⁰³ See Dept. of Justice, *supra* note 189.

²⁰⁴ See *id.*

²⁰⁵ See BROWN MILLER, *supra* note 135, at 14-15 (arguing that rape is not a crime of sex or passion but rather a crime of violence that places all women in a state of fear).

²⁰⁶ See CENTER FOR WOMEN POLICY STUDIES, *VIOLENCE AGAINST WOMEN AS BIAS MOTIVATED HATE CRIME: DEFINING THE ISSUE* 10 (1991) ("Many crimes against women involve excessive violence that characterizes bias-motivated hate crimes."); see also Angelari, *supra* note 59, at 66 (noting that rape attacks are frequently devoid of any criminal motive and are excessively violent in nature).

²⁰⁷ ALLISON & WRIGHTSMAN, *supra* note 134, at 152-61 (1993) (emphasis added).

²⁰⁸ See TJADEN & THOENNES, *supra* note 17 (finding that a little more than thirty-six percent of women raped by an intimate since the age of eighteen-years old sustained an injury other than that inherent in the rape itself, and about one-half of these women required immediate medical care).

III. THE NEXT STEP IN RAPE LAW REFORM

The remaining argument against the inclusion of rape as a crime of hate is even less compelling than those already addressed. Many opponents fear that the inclusion of rape would overwhelm the criminal justice system and stall the passage of progressive legislation and implementations of other hate crime issues.²⁰⁹ The fear that inclusion of rape will overwhelm the system, in both funding and enforcement, should be the greatest justification for the inclusion of rape as a crime of hate. This concern demonstrates the prevalence of rape and gender discrimination that permeates our culture. Exclusion of rape would, therefore, be a terrible mistake.²¹⁰

Because rape fits within the hate crime paradigm, society must take the next step and embrace the idea that rape is a crime of hate. Doing this will serve a two-fold purpose. First, it will assist in increasing the average length of incarceration of a rapist and in turn assist in specific and general deterrence.²¹¹ Secondly, and perhaps more importantly, rather than just increasing the sentence of a rapist, labeling rape a crime of hate will serve the expressive purpose of the law, validate the victims' experience, and send an unambiguous message that such actions are intolerable. The societal belief in the injustice of hate is reinforced and victims are reassured of their worth as members of our polity when steps are taken to deter hate-motivated behavior. Most importantly, a label of hatred will help to eliminate the rape myths in society and symbolically heal the wounds of those that become victims of such injustice.

A. *Penalty Enhancement is Appropriate for Rape*

Penalty enhancements are appropriate despite the supposed severe penalties currently imposed upon convicted rapists.²¹² An enhanced penalty system is justified by the median-time served by convicted rapists, the recidivist rate of offenders, and the

²⁰⁹ See Fernandez, *supra* note 61, at 275 (noting that the same opposition occurred when lobbyists were trying to include "gender" within hate crime statutes).

²¹⁰ See Rothschild, *supra* note 153, at 275 (analogizing the exclusion of rape in gender-biased crimes to the exclusion of lynching in racial-biased crimes).

²¹¹ See DRESSLER, *supra* note 94, at 37-40 (defining specific and general deterrence).

²¹² See, e.g., Weisburd & Levin, *supra* note 6, at 41 (noting that in thirteen percent of all cases no incarceration is imposed at all).

percent of offenders that are immediately released into the community.²¹³ According to one report, "Both the average sentence length and the minimum time to be served in prison [recently] decreased for rape offenders."²¹⁴ The average length of sentence dropped from 153 months to 140 months,²¹⁵ while the average time served for a rape conviction in prison dropped from ninety months to seventy-two months.²¹⁶ On average, a little over fifty percent of a sentence for a conviction of rape is served.²¹⁷

If these statistics were accurate, women may consider themselves relatively safe. Unfortunately, these statistics are not true in every rape conviction. In 1996, a total of seventy-nine percent of all sexual assaults brought before a state court resulted in some form of incarceration.²¹⁸ Sixty-three percent of those resulted in a sentence to time in prison, to which the above median time is applicable.²¹⁹ Sixteen percent resulted in a sentence to be served in a local jail, for which the average sentence imposed for all felonies is eight months, six months of which are served on average.²²⁰ Even more disturbing is the realization that twenty-one percent of rapists that are convicted are sentenced solely to probation, meaning that no time is spent behind bars and the average length of supervision imposed is three and one-half years.²²¹ The minimal amount of punishment imposed upon men that desecrate a woman's body and reduce society's security, compounded by the rate of recidivism, justifies a heightened penalty.

This increased penalty, assuming it is proper in light of the current statistics of time served and rates of recidivism, can be justified in two ways. First the heightened sentence would stay

²¹³ See Paula M. Ditton & Doris James Wilson, *Truth in Sentencing*, Jan. 1999, at <http://www.ojp.usdoj.gov/bjs/pub/ascii/tssp.txt> (detailing the amount of time served by offenders while in prison, and noting that it is almost always shorter than the time they are sentenced to serve).

²¹⁴ *Id.*

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See Weisburd & Levin, *supra* note 6, at 41 (noting that convicted rapists serve a median time of only 47 months).

²¹⁸ See Jodi Brown et al., *Felony Sentences in State Courts*, May 1999, at <http://www.ojp.usdoj.gov/bjs/pub/ascii/fssc96.txt>.

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ See *id.*

within morally prescribed bounds of proportionality²²² since it would reflect the three levels of increased harm that result: the increased psychological harm to the victim; the increased sense of fear and vulnerability imposed upon the target community; and the fear imposed upon the community in general. Second, the increased penalty is justified because it will have an impact based on both specific and general deterrence principles.²²³ An interesting argument against the deterrence-serving function of the increased penalty asserts that hate crime perpetrators when incarcerated with those that they despise will only increase and intensify the existing hatred, ultimately undermining the deterrence purpose of the incarceration.²²⁴ While there is certainly some credence to this argument, the opposite is likely true for a male convicted of rape as he is relegated to the position of his very own victim. He will learn to live in continual fear of violation and assault and will be forced to have to make adjustments in his daily living to avoid falling prey to sexual advances of other inmates.²²⁵ These two justifications, however, cannot, standing alone, justify prosecuting rape as a crime of hate, and therefore subjecting rape to an increased penalty, because if this sufficed, then all the legislatures would have to do is add years to rape penalties.

B. The Expressive Purpose of Prosecuting Rape as a Hate Crime

A purpose of the law is to reflect the moral sentiment of society.²²⁶ Therefore, a penalty should reflect the community's

²²² For an interesting discussion on the concept of proportionality and the 8th Amendment's prohibitions on cruel and unusual punishment see *Coker v. Georgia*, 433 U.S. 584, 598–99 (1977) (finding that the death penalty for a rape of an adult woman was disproportionate and specifically forbidden by the 8th Amendment).

²²³ See Lawrence, *supra* note 65, at 354 (discussing the need to increase punishment for bias-crimes based upon both a culpability and harm analysis). For a thorough discussion of principles of deterrence, see DRESSLER, *supra* note 94, at 15.

²²⁴ See Craig L. Urich, Comment, *Hate Crime Legislation: A Policy Analysis*, 36 HOUS. L. REV. 1467, 1493 (1999) (noting that for someone with severe hatred of lesbians and gays who is forced into homosexual activities in prison, prison may intensify the already strong hatred of homosexuals).

²²⁵ See JAMES GILLIGAN, VIOLENCE 163–90, 174 (1996) (describing the likelihood that an inmate will “get raped within the first twenty-four to forty-eight hours. That’s almost standard.”) (citation omitted). These incidents often involve gang-rapes by as many as fourteen individuals. See *id.* at 176.

²²⁶ See JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81–82 (1883 ed.) (asserting that a sentence converts “into a final judgement of what might otherwise be a transient sentiment”); see also JOEL

moral sensibilities and indignation with the act committed²²⁷ since the law is special social convention that signifies moral condemnation of the offender.²²⁸ The law is, therefore, an affirmation that society stands behind the values it believes in.²²⁹ A hate crime label would add to society's already existent condemnation of rapists, in that this crime would be recognized as a kind of terrorism²³⁰ specifically directed at a class of people—namely women—that creates a special injury for the class. The label will also give expression to the hatred and disgust that is excited by the commission of a bias-crime.

Rape, like other crimes of hate, inflicts physical as well as intangible injuries.²³¹ These intangible injuries send a symbolic message to the victim—a message that the perpetrator has value and “counts” but that the victim is worthless.²³² It can be interpreted then, that the way in which society reacts to one's victimization is a reflection of how valuable society believes the victim to be. This in turn can be seen as a reflection of how important one's existence really is.²³³ Therefore, if rape were classified as a crime of hate, society and the criminal justice system would in effect be saying that the value of the victim is significant and that the symbolic meaning behind a rape—of devaluing a woman—is undermined and negated.²³⁴ If, on the other hand, the criminal justice system does not treat rape as a crime of hate, it is in unequivocal terms telling a rape survivor

FEINBERG, DOING AND DESERVING, *Essays in the Theory of Responsibility*, 95–118 (1970) (discussing in great detail the expressive purpose of the law and the goals of punishment).

²²⁷ See Dan M. Kahan, *Response: Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2483 (1997) (“By selecting an affliction of the appropriate form and severity, the community expresses condemnation of the wrongdoer and reaffirms its commitment to the values that the wrongdoer's own act denies.”).

²²⁸ See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996).

²²⁹ See *id.* at 607.

²³⁰ See Stephen L. Pomerantz, THE FBI AND TERRORISM, FBI LAW ENFORCEMENT BULLETIN, Oct. 1987, at 14 (noting that bias-crimes fit the FBI definition of terrorism). Terrorism is “[t]he unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof in the furtherance of political or social objectives.” *Id.*

²³¹ See Weisburg & Levin, *supra* note 6, at 30.

²³² See *id.* at 24–25.

²³³ See Pomerantz, *supra* note 230, at 7.

²³⁴ See *id.* at 5 (stating that a crime has symbolic meaning and so too does the punishment imposed).

that she is not valuable enough for society to construct a significant protective barrier—namely a label of hate.²³⁵ Therefore the idea is that the label of a hate crime, which sets off bells in the minds of law abiding citizens that a grievous injustice has been committed, will be properly expressive of the perpetrator's and the victim's value. To a degree this label will serve as a way to symbolically heal the injuries sustained by, and remove the "price tag" placed upon, the victim. Simultaneously, prosecuting rape as a hate crime will reaffirm the message that any form of rape will not be tolerated and will enable victims to gain confidence in the criminal justice system and prompt reports of rape.

A hate crime label will also assist in removing the social stereotypes and myths that pervade a rape case. By focusing on the vile conduct of the defendant, the legal system may well lose its fascination with the conduct of the victim.²³⁶ As one scholar has noted, "focusing on the bias involved in the particular rape . . . may direct emphasis away from the sexual nature of the act . . . and eradicate the societal myth that rape is a misguided sexual urge."²³⁷ It has been shown that rape convictions regularly fail because of the prevalence of myths that surround the crime.²³⁸ Consider the article by New York Supreme Court Justice Richard T. Andrias, which lists seven common rape myths: a true victim of a rape will immediately seek out and complain to family, friends or the police; a rape usually occurs at night, out of doors, and between strangers; the perpetrator uses a weapon and leaves the victim physically injured; rape is an expression of sexual (albeit misplaced) desire; women regularly falsely accuse men of rape; a woman invites sexual assault by her dress, behavior, or being alone in the wrong place; a woman's prior consensual sexual relations with the accused or with others known to the accused implies consent; a woman impaired by drugs/alcohol desires to be raped.²³⁹ It is precisely these falsities,

²³⁵ See *id.* at 7. The murder of a young homosexual by a heterosexual male who was let off with a mere slap on the wrist, as portrayed by Kahan, demonstrates that the victim lacked value in comparison to the perpetrator. See *id.*

²³⁶ See Weisburd & Levin, *supra* note 6, at 41.

²³⁷ Angelari, *supra* note 59, at 103.

²³⁸ See *supra* notes 189–99 and accompanying text (discussing the underreporting of victims because of an insensitive criminal justice system).

²³⁹ See Richard T. Andrias, *Rape Myths*, 7 A.B.A. CRIM. JUST. 3, 3 (1992).

and others²⁴⁰ that enable the criminal justice system to fail women. I suggest that treating rape as a hate crime will deflect the emphasis away from the victim and emphasize the significance of the violence. Inclusion of rape as a hate crime will certainly help combat these myths by telling society that rape is a crime that occurs not because a woman asked for it or deserved it, but because of her gender. A label of hate will aid the nation in adjusting its attitude toward rape and will empower victims and help heal their wounds.²⁴¹

CONCLUSION

The statistics prove that rape is a problem of epidemic proportion. In light of this, it is evident that women are in need of a tool that will help increase the success rate of prosecutions and validate their worth as people. Labeling rape a crime of hate is an ideal means to achieve the necessary ends. Rape fits within the hate crime paradigm and it has been demonstrated that rape is certainly motivated, in part, by one's gender. By labeling rape a crime of hate, society is clearly validating the worth and experience of millions of women and helping to heal unjustly inflicted wounds, while securing the sexual autonomy of its members and properly condemning the men that instill terror based upon gender. It is also possible that the label of hate will erase the social myths that overwhelm the crime of rape and hinder the success of prosecutions. By putting an end to these myths, society will help to empower women to gain confidence in a criminal justice system that has long prevented rape prosecutions and enable women to report and prosecute rapes successfully. The enhanced penalty that would accompany a conviction of a hate crime is appropriate in light of the median time a rapist spends behind bars, if any, and because of the

²⁴⁰ See Lisa Heinzerling, *So Rape Isn't Hatred?* L.A. TIMES, May 4, 1990, at B-7. Heinzerling states,

We are not, it is true, accustomed to thinking of crimes against women in the same way that we think of racial or ethnic violence. We tend, instead, to treat brutalizing acts against women either as isolated cases—that is, as events brought about by some specific characteristic or conduct of the victim—or, in rare cases, as manifestation of racial or ethnic hatred.

Id.

²⁴¹ See MacKinnon, *supra* note 152, at 1302 (stating that inclusion of rape as a crime of hate will empower victims and make the problem of rape, and its associated violence, visible in a culture that normalizes and eroticizes sexual force).

likelihood that a rape perpetrator will commit multiple rapes in a career of crime. In addition, labeling rape a crime of hate will educate the populous at large that rape is not a crime of sex, nor a crime of violence alone, but rather rape is a crime of hate committed against women precisely because they are women.

